Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES

vs.

FRANK DUDLEY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The question involved in this case is whether certain imports are free of duty. The imports in question were eight car-loads of spruce lumber, a part of which consisted of planks from 2 to 4 inches in thickness, of varying widths and lengths, and the balance of inch boards from 3 to 5 inches wide, and from 12 to 16 feet in length. The planks were planed on one side and grooved. The boards were planed on one side and tongued and grooved.

The importer contended that these articles were entitled to entry free of duty, under the provisions of paragraph 676 of the act of August 28, 1894, which includes "sawed boards, planks, deals, and other lumber, rough or dressed."

The collector of customs held that they were subject to an *ad valorem* duty of 25 per centum, under the provisions

of paragraph 181, Schedule D, of said act, which imposes that duty upon "house and cabinet furniture of wood, wholly or partly finished, manufactures of wood, or of which wood is the component material of chief value, and not specially provided for in this act."

The importer paid the duty under protest. These protests were considered and acted upon by the board of general appraisers, which sustained the action of the collector of customs. From this decision the importer appealed to the Circuit Court for the district of Vermont. That court reversed the classification of the general board of appraisers and decreed that the articles were free of duty. From this decree an appeal was taken by the Government to the Circuit Court of Appeals for the second circuit. Here the decree of the circuit court was affirmed, and this petition is brought to review that decision.

It is not designed to attempt an argument of the questions involved, but simply to state the general lines upon which that argument has and must proceed, so that the court, in passing upon this petition, may have in mind the nature of these questions.

The Government claimed that the articles were manufactures of wood; the appellee that they were dressed lumber. Forty-seven witnesses were examined, twenty-four by the Government and twenty-three by the importer. All of the Government witnesses testified, several with some reluctance, that lumber planed upon one or two sides was known in the trade as "dressed lumber;" that when the edges were tongued and grooved, or grooved, as in case of the imports in question, it passed from the condition of dressed lumber, and that the imports in question were not known in the trade as "dressed lumber."

The twenty-three witnesses produced by the importer all testified that the articles in question were known in the trade as "dressed lumber." From an examination of the

testimony it is perfectly apparent that an indefinite number of witnesses might be called with the same result.

The appellee insisted that this question was not one of trade designation, nor of the opinion of witnesses, but of the interpretation of this statute upon the undisputed facts in the case, and this was the view taken by the circuit court for the district of Vermont.

Frank Dudley *vs.* United States, 74 Fed. Rep., 548.

The claims of the appellee were as follows:

1. Lumber is divided into two general classes—rough lumber and dressed lumber. Rough lumber is lumber as it comes from the saw. Dressed lumber is lumber as it comes from the planing or dressing machine.

Rough lumber is divided into certain classes, like sills, rafters, overlays, barn boards, fence boards, etc., etc. These names denote the purpose to which lumber of a certain grade and size is adapted and for which it is generally used.

Dressed lumber is in the same manner divided into classes, like flooring, sheathing, etc., etc. Of the importations in question the inch boards were known as flooring, and the plank as factory flooring and factory roofing. These names designate, as in the case of rough lumber, the purpose for which lumber of that kind is adapted and to which it is ordinarily put.

The lumber in question was butted to exact lengths—that is to say, it would be 12, 14, or 16 feet long, as the case might be—and the Government laid great stress upon this as tending to show that it had been set apart and designated for a particular purpose. The testimony showed that rough lumber in precisely the same way was butted to exact lengths, and was to the same extent set apart for a specific purpose. The object of this in both cases was to enable the purchaser to use the lumber with as little waste as possible; but it still required fitting with the plane and saw by the carpenter before it became a part of the permanent structure.

The Government also contended that since this lumber received a definite name, that indicated that it had been set apart for a definite purpose, and had, therefore, become what might be termed a "manufacture" of lumber; but the testimony here showed that while such lumber would ordinarily be used for a particular purpose, it might still be used for a variety of other purposes.

Take, for instance, the flooring, of which a large part of this importation consisted. This is made at one process by running the rough board through a planing machine which smooths at the same time one or both sides, and also either smooths or tongues and grooves the edges. Large quantities of lumber are treated in this way, and it was conceded that when it left the machine it could be used for various purposes, and would be so used according to the grade of the lumber, the better qualities being used for top flooring, and the poorer qualities for under flooring, for boarding the outside of houses, for making boxes, and for almost every purpose for which boards can be employed.

The important thing to notice is that in all cases the article, after passing through the dressing machine, still continues to be lumber. It is known in the trade as lumber. It is bought and sold by the thousand feet as lumber. All the witnesses, with one exception, concurred in this.

It does not become a manufacture of wood until it ceases to be lumber and has impressed upon it the character of some manufactured article.

From these general considerations it must sufficiently appear that the words "lumber, rough or dressed," as they occur in paragraph 676, include all lumber, except such as is otherwise specified. No artificial distinction can be drawn between a board whose sides have been smoothed and that same board when, by running it through the same machine at the same time, its edges have also been dressed.

2. The Government insists that the imports in question were properly classified as manufactures of wood under paragraph 181. If there is any doubt upon this point, it claims that they should be classified under the general section as articles not otherwise enumerated.

Previous tariff acts since 1872 have always contained a paragraph similar to 181. During all this time lumber planed one side and tongued and grooved has been dutiable as such by name. Enormous quantities of lumber are dressed for use in this way. It is incredible that the act of 1894 should have intended to include within this paragraph an article of the general importance of this and one which had always heretofore been referred to specifically. It is equally incredible that Congress should have intended to include an article of such universal use under the general clause which is only intended or supposed to apply to things accidentally omitted from the enumeration.

3. All this is still more apparent from a consideration of the history of the passage of the act of 1894 through Congress. While the statements of different members in debate may not be admissible, it is well settled that the history of the measure itself can be shown when the meaning of the act is doubtful.

American Net & Twine Company *vs.* Worthington, 141 U. S., 473.

Blake *vs.* National Bank, 23 Wallace, 318.

The act of 1872, in the wood schedule, provided for "sawed boards, plank, deals, and other lumber of hemlock, whitewood, sycamore, and basswood, $1 per thousand feet of board measure. * * * *Provided*, That when lumber of any sort is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished 50 cents per thousand feet; and if planed on one side and tongued and grooved, $1 per thousand feet;

and if planed on two sides and tongued and grooved, $1.50 per thousand feet." The act of 1883 was identical with the above.

The act of 1890 provided for "sawed boards, plank, deals, and other lumber of hemlock, whitewood, sycamore, white pine, and basswood, $1 for one thousand feet, board measure; * * * but when lumber of any sort is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished 50 cents per one thousand feet, board measure; and if planed on one side and tongued and grooved, $1 per thousand feet, board measure; or if planed on two sides and tongued and grooved, $1.50 per thousand feet, board measure."

As the present law originally passed the House of Representatives, it contained paragraph 181 as it now stands. Paragraph 676 covered "sawed boards, plank, deals, and other lumber." Paragraph 178 provided for "lumber of any sort, planed or finished. For each side so planed or finished 50 cents per thousand feet, board measure; and if planed on one side and tongued and grooved, $1 per thousand feet, board measure; and if planed on two sides, tongued, and grooved, $1.50 per thousand feet, board measure."

In the Senate, upon motion of Senator Allen, of Nebraska, paragraph 178 was stricken out, and paragraph 676 was amended by adding after the word "lumber" the words "rough or dressed," so as to make that paragraph read as it now does. Is it not manifest that the intention of this amendment was to admit free of duty under paragraph 676 what would have been dutiable under paragraph 178?

The value of the lumber in question is some $10 per thousand feet, and the duty assessed $2.50 per thousand feet.

Neither the present law as it came from the House of Representatives nor any previous tariff act had ever imposed a duty upon such lumber of more than $1 per thousand feet in excess of the duty upon rough lumber—that is,

the effect of this amendment was to increase the duty upon an every-day necessity of universal consumption two and one-half times. Is it possible that a free-trade Congress, in amending a free-trade tariff bill in order to secure the vote of a free-trade Populist, intended to bring about this astonishing result?

It has been said by this court that the jurisdiction here invoked should be exercised "sparingly and with great caution and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision."

American Construction Company *vs.* Jacksonville, Tampa & Key West Railway Co., 148 U. S., 372, 383.

There is nothing in this case which calls for the exercise of that jurisdiction. The question is simply upon the interpretation of a statute which has practically ceased to exist. The amount involved, although considerable to an individual, is insignificant to the Government. It is respectfully submitted that there is no public exigency which requires that the appellee should be further harassed by a continuance of this litigation.

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